IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1847

MARK W. GERACI, et al.,

Petitioners,

v.

ST. XAVIER HIGH SCHOOL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

1. Whether, where a petitioner seeks reinstatement to high school, a petition for certiorari is rendered moot by reason of the petitioner's graduation from another high school?

2. Whether the strictures of the due process clause of the fourteenth amendment apply to the disciplinary procedures of a private, parochial high school?

STATEMENT OF THE CASE

On June 2, 1978, the last day of classes for the school year, Mr. James Downie, a teacher at St. Xavier High School, was administering a test to a junior English class, including Petitioner Mark Geraci. Thomas McKenna, a student at another Cincinnati parochial high school, stole into the classroom and struck Mr. Downie in the face with a pie. A struggle ensued between McKenna and Mr. Downie and other teachers. Mr. Downie and another teacher were injured and a glass exit door to the school was shattered in the melee, described by Mark Geraci in the trial court as a "riot."

Upon investigation by the school administrators it was learned that Mark Geraci had solicited his friend McKenna to attack Mr. Downie. Respondent Thomas Meyer, the Assistant Principal for Student Affairs, and the school principal, Respondent Michael Trainor, agreed that Mark Geraci should be contacted and given an opportunity to explain his involvement, if any, and that *if* he admitted to involvement, he would be expelled. Geraci was called at home by Mr. Meyer, who had primary responsibility for disciplinary matters, and asked to come to the school. Geraci had the opportunity to have his mother accompany him but he told her not to do so. Upon being confronted by Mr. Meyer with the accusations against him, Geraci voluntarily admitted his complicity in the planned attack. Faced with this admission, Mr. Meyer expelled him.

Subsequently both Mark Geraci and his father, Petitioner Joseph Geraci, were afforded numerous opportunities to confer privately with St. Xavier's administrators, including the Principal, Mr. Trainor, and the President, Respondent Fr. Paul Borgmann. Joseph Geraci met with Mr. Trainor on Saturday, the day following the attack.

On the next Monday, both Mark Geraci and his father met with Father Borgmann, and on Tuesday Mr. Geraci conferred again with Father Borgmann. In view of the severity of the acts of which Mark Geraci was admittedly a part, the expulsion was upheld.

Contrary to Petitioners' assertions, the evidence at trial clearly established that Mark Geraci did not withdraw from the plot to attack Mr. Downie. During his initial interview with Mr. Meyer, Mark Geraci alleged that he believed that McKenna would not actually perform the attack. Subsequent to the expulsion, however, facts to substantiate the lack of veracity in this contention came to light for the first time.

The original plan was hatched a few weeks before the attack by a group of St. Xavier students, including Mark Geraci. Mark agreed to and did contact his friend McKenna to enlist his aid. By Mark Geraci's own admission at trial the idea then became dormant and "died out." The plan was revived on the evening before the attack during a telephone conversation between Geraci and McKenna (initiated by Geraci) at which time Geraci provided instructions as to the location and time when Mr. Downie could be found and the most effective route of entrance to and escape from the school premises. By agreement, Geraci then telephoned a mutual acquaintance to arrange for him to transport McKenna to St. Xavier the next day. The attack occurred in exactly the manner planned by Geraci (a plan unknown to the other St. Xavier students he claims were involved), except that McKenna was apprehended by school authorities and, upon questioning, implicated Geraci. When questioned by Mr. Meyer and, later that same day, by his parents, Mark Geraci concealed these facts, thereby evidencing the depth of his complicity in the plot.

At trial, Mr. Trainor and Fr. Borgmann described the attack on Mr. Downie which Mark Geraci helped engineer as a most serious breach of discipline and decorum and as a traumatic experience for the teacher and for St. Xavier High School as an educational institution. The school administrators reached the very difficult decision to expel Mark Geraci for participating in this attack while always showing, as found by the Court of Appeals, "a genuine human concern" for Mark and his father.

REASONS FOR DENYING THE WRIT

I. THE PETITION HAS BEEN RENDERED MOOT BY THE GRADUATION OF PETITIONER MARK GERACI FROM ANOTHER PRIVATE, PAROCHIAL HIGH SCHOOL.

Following his expulsion from St. Xavier High School for his admitted complicity in an attack on a teacher, Petitioner Mark Geraci enrolled at another private, parochial high school, Moeller High School, to complete his senior academic year. He has now graduated from this school. Petitioners' Brief p. 22.

Mark Geraci's graduation renders this action to have his expulsion set aside and to be reinstated at St. Xavier moot. *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974). This conclusion is not altered by the fact that petitioners in their brief now raise an asserted prayer for expungement of Mark Geraci's records since this matter was not brought

before the trial court. *Board of School Commissioners of the City of Indianapolis* v. *Jacobs,* 420 U.S. 128 (1975).[1]

Moreover, petitioners have admitted that no real viable controversy remains pending before this Court for decision. Rather, they seek a writ of certiorari as a matter of abstract principle, as admitted in their publicity statements to the press. Appendix A hereto. It is a fundamental judicial principle that such purely academic, abstract questions are to be dismissed as moot. *Hicklin* v. *Coney,* 290 U.S. 169, 173 (1933). See *State ex rel. Devine* v. *Baxter,* 168 Ohio St. 559, 156 N.E.2d 746 (1959). "[T]his Court does not sit to decide arguments after events have put them to rest." *Doremus* v. *Board of Education of the Borough of Hawthorne,* 342 U.S. 429, 433 (1952). The petition for certiorari should be denied because the issue raised is moot and petitioners assert a mere abstract principle.

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[1] *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 (1976) is easily distinguishable and of no aid to Petitioners since it involved a class action which, because the class was certified before the claims of the nominal plaintiffs were mooted, continued to involve a viable controversy. Ohio Revised Code § 2721.09, cited by Petitioners, likewise affords no additional relief since this provision only authorizes an Ohio court to grant incident relief subsequent to that which the party has already pleaded and secured.

II. THE DECISION BELOW IS IN ACCORD WITH THE DECISIONS OF THIS COURT, AND OF LOWER FEDERAL AND STATE COURTS, AS TO THE APPLICATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO PRIVATE, PAROCHIAL SCHOOLS.

The decision that the disciplinary actions of St. Xavier High School, a private, parochial school, are not subject to the due process clause of the fourteenth amendment to the United States Constitution conforms with nearly a century of settled constitutional doctrine.

For nearly one hundred years this Court has affirmed and reaffirmed "the essential dichotomy" set forth in the fourteenth amendment between acts of the state and conduct of private entities. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974); *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948); *Civil Rights Cases*, 109 US 3 (1883). The fourteenth amendment's mandate of due process extends only to the actions of a state, or one acting as the state through the exercise of a traditional and exclusive state prerogative. *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 157 (1978); *Jackson, supra* at 351; *Civil Rights Cases, supra* at 11. Accordingly, this Court and a consistent host of lower federal and state courts have unfailingly refused to subject private, parochial schools to the strictures of this amendment.

Private educational institutions, such as St. Xavier High School, do not act as the state because they engage in a function (education) also performed by the public sector and of interest to the public at large. This principle most

recently was confirmed by this Court in *Jackson, supra* at 354, and at n. 9.[2]

> We do not believe that such a status converts their every action, absent more, into that of the State.[9]

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[9] The argument has been impliedly rejected by this Court on a number of occasions. See, e.g., *Civil Rights Cases*, 109 U.S. 3, 8 (1883). It is difficult to imagine a regulated activity more essential or more "clothed with the public interest" than the maintenance of schools, yet we stated in *Evans* v. *Newton*, 382 U.S. 296, 300 (1966):

> "The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions. While a State may not segregate public schools so as to exclude one or more religious groups, those sects may maintain their own parochial educational systems."

This exclusion of private schools and education from the parameters of the public function doctrine is fully consistent with the rationale which underlies the narrow bounds of this doctrine. As articulated by this Court, under the public function, or sovereign function, doctrine,

> State action [is] present in the exercise by a private entity of powers traditionally exclusively reserved to the State.

Jackson, supra at 352. Thus, because a function must be one exclusively performed by the state for it to be a "public function," this Court consistently has declined to extend the public function doctrine to those instances where

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[2] Petitioners concede, as they must, that this Court has never determined that a private, secondary school engages in a public function when it disciplines one of its students so as to raise due process considerations. Petitioners' Brief p. 16.

private entities engage in activities "not traditionally the exclusive prerogative of the State." *Jackson, supra* at 353.[3] As this Court has acknowledged, education has never been the "exclusive prerogative of the State." Private schools and private education have a long and distinguished history in our country existing coextensive with public schools and public education, as equal partners in the rearing of the nation's youths. *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534 (1925).[4] Thus, since education is not an exclusive prerogative of the state, such that its delegation by the state to a private entity would be accompanied by fourteenth amendment considerations, private institutions engaged in educational activities are not state actors for the purposes of the due process clause of the amendment.

Lower federal courts have considered the public function doctrine in the context of the disciplinary procedures of private schools and consistently have held that such are not bound by constitutional restraints imposed on similar public school procedures. In *Greenya* v. *George Washington Univ.,* 512 F.2d 556 (D.C. Cir.), *cert. denied,* 423 U.S. 995 (1975), the Court of Appeals for the District of

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[3] This Court has limited the application of this doctrine to two areas, the conduct of elections, and company towns encompassing all the attributes of a municipality, which "have in common the feature of exclusivity." *Flagg Bros., Inc., supra* at 159.

[4] In considering Petitioners' appeal, the Court of Appeals of the First Appellate District of Ohio correctly acknowledged that private education is not a power traditionally and exclusively reserved to the state and that, therefore, private schools do not necessarily engage in a public function. It observed: "Education is not now and has never been an exclusive function of the state. Privately controlled and administered educational institutions have a long and distinguished history in this country." Opinion of Court of Appeals, pgs. 7a-8a of Petitioners' Brief, Appendix D. (Citations omitted)

Columbia rejected the argument, made at bar by petitioners,[5] that private schools engage in a public function. It reasoned that:

> education, even at the primary or secondary levels, has never been a state monopoly in the United States. As a historical matter, the widescale private developmen of higher education in this country preceded state entry into the field by more than a century. *Powe* v. *Miles,* 407 F.2d 73, 79-80 (2nd Cir. 1968), reaffirmed, *Grafton* v. *Brooklyn Law School,* 478 F.2d 1137 (2nd Cir. 1973).

Id. at 561, n. 10. In accord are *Berrios* v. *Inter American Univ.,* 535 F.2d 1330, 1333 (1st Cir. 1976); *Grafton* v. *Brooklyn Law School,* 478 F.2d 1137, 1140 (2d Cir. 1973); *Powe* v. *Miles,* 407 F.2d 73, 79-80 (2d Cir. 1968); *Lorentzen* v. *Boston College,* 440 F. Supp. 464, 465 (D. Mass. 1977), *affirmed* 577 F.2d 720 (1st Cir. 1978); *Melanson*

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[5] Petitioners' authorities cited at page 7 of their Brief are readily listinguishable. *Slaughter* v. *Brigham Young Univ.,* 514 F.2d 622 (10th Cir.), *cert. denied,* 423 U.S. 898 (1975) deals solely with the issue of a student's rights under an enrollment contract and does not address the public function doctrine and constitutional due process, as Petitioners suggest. The holding in *Buckton* v. *NCAA,* 366 F. Supp. 1152 (D. *Mass.* 1973) was based upon *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968), which has since been overruled by this Court. *Hudgens* v. *NLRB,* 424 U.S. 507 (1976); *Flagg Bros., Inc., supra* at 159. Moreover, Buckton is also suspect on the peculiar facts involved. That is, Boston University asked to be joined in the action since it favored the position of the plaintiff-hockey players. It wanted the plaintiffs to play for the school team and, hence, had no reason to dispute jurisdiction. *Belk* v. *Chancellor of Washington Univ.,* 336 F. Supp. 45 (E.D. Mo. 1970) and *Hammond* v. *University of Tampa,* 344 F. 2d 951 (5th Cir. 1965), did not involve the issue of private school discipline. Nevertheless, the *Belk* court recognized "the principle that the power exercised by a private university in disciplining student members is not 'state action'." 336 F. Supp. at 47. In *Presseisen* v. *Swarthmore,* 71 FRD 34 (E.D. Pa. 1976) the issue was the sufficiency of allegations of state action by a private school. The evidentiary sufficiency of such claims was not before the court.

v. *Rantoul*, 421 F. Supp. 492, 495 (D. R.I. 1976), *affirmed sub nom., Lamb* v. *Rantoul*, 561 F.2d 409 (1st Cir. 1977).

Two further decisions are particularly illustrative. In *Huff* v. *Notre Dame High School of West Haven*, 456 F. Supp. 1145 (D. Conn. 1978), a private, parochial high school student was expelled for disciplinary reasons. He was allowed to confer with school administrators concerning his expulsion, but without the assistance of his parents or counsel. The district court dismissed the student's complaint that he had been denied procedural due process rights under the fourteenth amendment, holding that private, parochial high schools are not engaged in a "public function" because they provide educational services. *Id.* at 1149-50. Similarly, in *Wisch* v. *Sanford School, Inc.*, 420 F. Supp. 1310 (D. Dela. 1976), in which a student was expelled from a private high school for the possession and use of marijuana, the district court held the due process strictures of the fourteenth amendment inapplicable to the disciplinary actions of the private school.

The constitutional doctrine announced by this Court and consistently applied by lower courts prohibits only a state or one acting as the state from depriving another of an interest encompassed within the protection of the fourteenth amendment. Petitioners concede that "St. Xavier High School is not a part of the State of Ohio." Petitioners' Brief p. 12. Moreover, when it disciplined petitioner Mark Geraci for plotting and assisting in the attack on one of its teachers, St. Xavier was not engaging in an exclusive governmental prerogative, such as to be acting as the state. Thus, St. Xavier's action was not subject to the stricture of the fourteenth amendment.

This conclusion is not altered by the fact that St. Xavier, like all private schools, is subject to the state's power to

prescribe minimum educational requirements, nor by the fact that, as found by the trial court, "St. Xavier High School receives only minimal and indirect aid from the State of Ohio." Judgment Entry, Finding Number 1, Page 27a of Petitioners' Brief, Appendix H.

This Court long has recognized the power of the state to prescribe reasonable uniform regulations applicable to all schools without altering or interfering with the separate and distinct nature of private schools. *Pierce, supra* at 534. The mere fact that an activity, such as education, is subject to some state regulation does not convert it into state action. *Jackson, supra* at 350; *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 176-177 (1972).[6]

Lower federal courts consistently have applied this principle and uniformly held that the state's legitimate interest in the regulation of the education of children in all schools, public and private, does not ineluctably convert private schools into an arm of the state. *Grafton, supra; Huff, supra; Wisch, supra; Furumoto* v. *Lyman*, 362 F. Supp. 1267 (N.D. Calif. 1973). Moreover, private schools are not held to be state actors:

1) because of the grant of a tax exemption. *Greenya, supra* at 560 n.4; *Huff, supra* at 1148; *Wisch, supra* at 1314; *Bright* v. *Isenbarger*, 314 F. Supp. 1382, 1396 (N.D. Ind. 1970), *affirmed*, 445 F.2d 412 (7th Cir. 1971);

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[6] Petitioners' reliance on Ohio Revised Code § 3321.04(C) adds nothing to their contentions. Petitioners' Brief p. 16. This statute simply acknowledges a school's "inherent authority to maintain order and to discipline students." *Esteban* v. *Central Mo. State College*, 415 F.2d 1077, 1088 (8th Cir. 1969) (Judge, now Justice, Blackmun). Such recognition of St. Xavier's precedent inherent right to discipline its students does not transmute its acts pursuant to this private right into state action. *Flagg Bros., Inc., supra* at 164-165; *Jackson, supra* at 357.

2) because of the grant of a corporate charter. *Greenya, supra* at 560 n.4; *Powe, supra* at 801; *Furumoto, supra* at 1278; or

3) because of the receipt by some students or their parents of transportation or school book subsidies. *Huff, supra* at 1148[7]; *Wisch, supra* at 1314; *Bright, supra* at 1396; *Grossner* v. *Trustees of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968).

Lacking any constitutional or doctrinal authority for their contention that private entities are bound by the fourteenth amendment, Petitioners would have this Court consign a century of constitutional interpretation and doctrine to the scrapyard of history. On one level, they ask the Court arbitrarily to designate all nonprofit, private entities, such as schools, churches, charities, and nonprofit foundations, as state actors for the mere reason that these private entities are engaged in benevolent charitable activities of concern to the public. Petitioners' Brief pp. 14-15. More incredibly, petitioners, apparently neither content nor comfortable with such a forced construction of what constitutes state action, ask this Court to rewrite the fourteenth amendment by excising the word "State" to make it "enforceable against private citizens, as well as against states." Petitioners' Brief p. 15.

The petitioners' iconoclastic assault on constitutional doctrine cannot prevail. This Court consistently has rejected such overbroad claims of what constitutes a public function as "read[ing] too much into the language of our previous cases." *Flagg Bros., Inc., supra* at 158; *Hudgens* v. *NLRB*, 424 U.S. 507, 519 (1976); *Lloyd* v. *Tanner*,

[7] As the *Huff* court also correctly pointed out, "if all private schools were 'the state', the difficult problem of aid to parochial schools would not exist," citing *Grossner, supra* at 549 n. 19. *Id.* at 1150.

407 U.S. 551, 569 (1972); *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 547 (1972). Nor has this Court ever recognized the argument that the fourteenth amendment is enforceable against private conduct. In *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), cited by petitioners at p. 15 of their brief, this Court held that rights growing out of the thirteenth amendment and other constitutional provisions may be enforced against private parties. However, it did not abandon the essential and basic constitutional dichotomy, subsequently reaffirmed, between state and private action for purposes of the fourteenth amendment. *Jackson, supra.* As recently as this past term, Mr. Justice Stevens, concurring in *Great American Fed. S & L Assn.* v. *Novotny*, 47 USLW 4681 (June 11, 1979) reiterated that *Griffin* instructs that: "The rights secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment are rights to protection against unequal treatment by the state, not by private parties." *Id.* at 4686.

St. Xavier High School is a private, parochial high school and acted as such when it disciplined Mark Geraci. The court below found no evidence that the State of Ohio was involved in St. Xavier's disciplinary action against Mark Geraci. This disciplinary action did not rise to the level of "state action" and, thus, fourteenth amendment due process considerations are not applicable.[8]

This is not to imply that standards of fairness are not pertinent to this process. Pursuant to the laws of the State

[8] Alternately, even if, hypothetically, St. Xavier did engage in "state action" when it disciplined Mark Geraci, the ultimate inquiry in this case is whether that action constituted a denial of due process. *Flagg Bros., Inc., supra* at 455 n. 4. This Court recently has reiterated that in *public* school disciplinary cases, as controlled by its opinion in *Goss* v. *Lopez*, 419 U.S. 565 (1975):

of Ohio and the contract of enrollment between petitioners and St. Xavier, the school has broad discretion in the exercise of its disciplinary proceedings. *Schoppelrei* v. *Franklin University,* 11 Ohio App. 2d 60, 228 N.E.2d 334 (1967); *Koblitz* v. *Western Reserve University,* 11 Ohio Cir. Dec. 515, 21 Ohio C.C. 144 (1901). After a full hearing with an opportunity to hear the evidence and observe the witnesses the trial court found, without diffculty, that St. Xavier had met that standard in its actions in response to the misconduct of Mark Geraci. After a full review of the entire record the state Court of Appeals concluded that the St. Xavier administrators acted within their discretion, pursuant to fundamentally fair procedures, and, indeed, with "a genuine human concern" for Mark Geraci and his father. Opinion of Court of Appeals, pg. 12a of Petitioners' Brief, Appendix D. It follows, then, that this case involves merely matters of state law and contract, which have been passed upon by those courts, and does not involve a substantial constitutional question.[9]

All that *Goss* required was an "informal give-and-take" between student and the administrative body dismissing him that would, at least, give the student "the opportunity to characterize his conduct and put it in what he deemed the proper context."

Board of Curators of the University of Missouri v. *Horowitz,* 435 U.S. 78, 85-86 (1978). At bar, Mark Geraci and his father were each provided three opportunities to present their case to St. Xavier officials before the expulsion was finally affirmed. This process would have been constitutionally sufficient under *Goss* and *Horowitz* even if St. Xavier were a public high school, which it is not. *Whiteside* v. *Kay,* 446 F. Supp. 716 (W.D. La. 1978).

[9] Petitioners as much as admit that their action does not involve a constitutional question when, finally, they confirm on page 24 of their Brief that "This case would not have arisen if any of the lesser penalties [than Mark Geraci's expulsion] had been chosen." Despite their protestations that they were denied constitutionally required process during the disciplinary proceedings, in fact their grievance is not with this process, which was found upon review by three courts to have been fundamentally fair, but with the degree of the penalty imposed for Mark Geraci's misconduct. This penalty was imposed within the school's sound discretion, to maintain discipline and decorum, as permitted by law and approved by the courts. Its degree does not raise a substantial constitutional question, nor do the Petitioners assert that it does.

CONCLUSION

Petitioners' Petition for Writ of Certiorari should be denied for the reasons set forth above.

Respectfully submitted,

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APPENDIX A

AREA NEWS

Pie-Throwing Expulsion Case Goes To High Court

Mark W. Geraci, a top student expelled from St. Xavier High School following a pie-throwing incident last year, has appealed to the U.S. Supreme Court a state court ruling upholding his expulsion.

Geraci's attorney, Hyman B. Rosen, has mailed to the high court a petition for a writ of certiorari. It probably will be at least seven months before the court decides whether to issue the writ and hear the appeal.

Rosen maintains St. Xavier denied Geraci due process of law by expelling him without a hearing.

In June, 1978, on the last day of school in Geraci's junior year at St. Xavier, he was accused of participating in an incident in which a lemon meringue pie was thrown at a teacher. Geraci was expelled summarily by a school administrator later the same day.

GERACI AND his father filed suit last August against St. Xavier and its administrators in an attempt to win Mark's reinstatement.

A Hamilton County Common Pleas judge upheld Mark's expulsion. The Ohio First District Court of Appeals and Supreme Court of Ohio upheld the trial court's ruling.

Geraci, 18, of 3510 E. Galbraith Rd., Amberley Village, was the number one student in his class at St. Xavier. As a senior at Moeller High School this year, he was top student in four of his six classes, and ranked second in the other two classes.

Geraci graduated from Moeller and will attend the University of Colorado in the fall. He was not accepted at Stanford University, his first choice, and he said interviewers at Stanford asked him about the pie-throwing incident.

"I don't know if it (rejection at Stanford) was because of what happened at St. X or not," Geraci said. "I guess I will always wonder."

HE PLANS to major in psychology as a pre-med student and wants to be a psychiatrist.

The question of Geraci's reinstatement at St. Xavier is moot. The appeal to the U.S. Supreme Court is being pursued on principle, Geraci said. He agrues that a previous Supreme Court ruling according due process rights to public school students should apply to private school students because private schools receive some government aid.

Rosen's appellate brief says the Geraci case is the first involving the denial of due process rights to parochial school students.

"I'm real optimistic that the Supreme Court will hear the case," Geraci said. "I think it's an issue they will want to hear, but I have no idea what they might decide."